

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 3891

IN THE MATTER OF:

Served February 24, 1992

Application of MADISON LIMOUSINE)
SERVICE, INC., for a Certificate of)
Authority -- Irregular Route)
Operations)

Case No. AP-91-39

By application accepted for filing on November 12, 1991, Madison Limousine Service, Inc. (Madison or applicant), a Virginia corporation, seeks a Certificate of Authority to transport passengers, together with mail, express, and baggage in the same vehicles as passengers, in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a manufacturer's designed seating capacity of 15 or fewer persons, including the driver.

We served notice of this application on November 21, 1991, in Order No. 3847,¹ and therein ordered Madison to publish further notice in a newspaper and file an affidavit of publication. Madison complied. Protests and requests for oral hearing were due no later than December 18, 1991.

Air Couriers International Ground Transportation Services, Inc., trading as Passenger Express (Air Couriers), filed a protest on December 18, 1991, challenging Madison's compliance fitness. Madison once held Certificate of Authority No. 132. We revoked that certificate on August 30, 1991, for violations involving Madison's knowing and willful unauthorized transportation of certain airline flight crews.² Air Couriers essentially contends that Madison is still transporting flight crews for hire in the Metropolitan District and requests discovery of billing and dispatch records from Madison and its customers and an oral hearing.

Madison filed a reply on December 30, 1991. Madison admits transporting flight crews in the Metropolitan District since August 30 but denies that this was transportation "for hire" because the crews allegedly were transported on a gratuitous basis. Madison further contends that Air Couriers has shown no reason why discovery and a hearing are necessary and in a supplement to its reply filed January 22, 1992, has produced invoices covering the last four months of 1991.

¹ In re Application of Madison Limo. Serv., No. AP-91-39, Order No. 3847 (Nov. 21, 1991).

² Air Couriers Int'l Ground Trans. Servs. v. Madison Limo. Serv., No. FC-90-02, Order No. 3810 (Aug. 30, 1991).

The invoices show that during September alone, Madison transported flight crews of five airlines between Washington Dulles International Airport (Dulles) and DC. The five airlines are: Lufthansa German Airlines (Lufthansa); Aeroflot Soviet Airlines (Aeroflot); All Nippon Airways (ANA); Air France; and Page Avjet Corporation (RAF). Madison apparently stopped transporting the ANA and Air France crews between Dulles and DC after September 5 and October 14, respectively, but continued transporting the others for the remainder of the year.³ Lufthansa crews were carried between Dulles and DC each day from September 1, 1991 through December 31, 1991 -- or 122 days. A total of 393 trips between Dulles and DC are recorded for the five airlines combined, all apparently at no charge.

The invoices also reveal that at various times throughout those four months, Madison performed other transportation services for which it billed the five airlines a total of \$22,303. Madison represents that these other services either were performed wholly in Virginia, did not involve transportation of passengers, or constituted bona fide taxicab service⁴ and thus did not require our authorization, even though the airlines admittedly were billed for those services. We assume without deciding that Madison's representations concerning these other services are correct, both factually and legally.

I. DISCUSSION

As discussed below, Air Couriers' timely protest is accepted for filing. Upon consideration of the protest and Madison's reply, as supplemented, the Commission finds that Madison has been transporting passengers for hire between points in the Metropolitan District in violation of the Compact, thus obviating the need for an oral hearing. Further, the Commission denies Madison's application for lack of regulatory compliance fitness, with leave to reapply in ninety days. Finally, the Commission assesses a civil forfeiture against Madison for its knowing and willful violations of the Compact and orders Madison to cease and desist from transporting passengers for hire between points in the Metropolitan District.

A. Air Couriers' Protest and Madison's Supplemented Reply

Commission Rule No. 13-01 provides in pertinent part that "[a] protest may be filed against the granting of any application . . . by any person having a substantial interest therein." Rule No. 13-02 provides in pertinent part that "[e]ach protest shall contain a concise statement clearly setting forth the substantial interest of the protestant in the proceeding." Air Couriers' protest contains no such statement. On the other hand, Madison does not oppose the protest on this ground, and it appears from the affidavits accompanying the protest that Air Couriers is a direct competitor of Madison. Accordingly, pursuant to Commission Rule No. 29, the Commission waives the requirements of Rule No. 13-02.

³ See Madison's January 22 supplement, affidavit of M. Hajoun at 2 and invoices for Lufthansa, Aeroflot and RAF.

⁴ Madison billed Aeroflot \$150 in October 1991, in part for VIP limousine service. We take it that Madison views this as bona fide taxicab service as defined in Commission Regulation No. 51-09.

Madison's reply was due within seven days of the date Air Couriers' protest was served.⁵ The reply was timely filed on December 30, 1991. The supplement was untimely filed on January 22, 1992. The Commission waives the seven day limitation period for the supplement since it is responsive to Air Couriers' discovery request.

Commission Regulation No. 54-04(a) requires each protest to be sworn and accompanied by "all available evidence." The four affidavits supporting Air Couriers' protest indicate that Madison has transported RAF and Lufthansa flight crews between Dulles and DC since August 30, 1991.⁶ As noted above, Madison admits this. .

B. Air Couriers' Request for Oral Hearing

Commission Regulation No. 54-04(b) governs requests for oral hearings in application proceedings. It mandates that "[e]ach request for oral hearing must contain reasonable grounds showing good cause to require such hearing, including the evidence to be adduced at oral hearing and the reason(s) why such evidence could not be adduced without oral hearing." A hearing will be granted only if it is deemed necessary. See Commission Regulation No. 54-05.

No oral hearing is necessary. Madison has produced many, probably most, of the records Air Couriers seeks, and the salient facts are not in dispute. Madison admits transporting passengers between points in the Metropolitan District after its Certificate of Authority No. 132 was revoked. Madison argues that this transportation is not "for hire" within the meaning of the Compact because it did not charge for these services and did not receive compensation of any kind in return.⁷ This argument is without merit.

The law is clear. It is a violation of the Compact to transport passengers for hire in the Metropolitan District without a Certificate of Authority.⁸ It is just as clear that the for-hire nature of a commercial carrier's enterprise is not nullified simply because that carrier does not collect or charge a fare.⁹

⁵ See Commission Regulation No. 54-04(d); Commission Rule No. 7-01.

⁶ The affidavits contain allegations concerning airlines other than RAF and Lufthansa, but most of those allegations are based on information and belief. The Commission does not regard this as evidence. One affiant does state that he witnessed Madison pick up a British Airways crew at Dulles, but he does not say where that crew was taken. Madison says it did not transport that crew outside Virginia. (See Madison's January 22 supplement, affidavit of M. Hajoun at 2.) The same affiant also fails to identify which crew was picked up by Madison on November 29, 1991.

⁷ Reply at 2; Letter of September 12, 1991, from Madison's counsel to the Commission's Executive Director (attached to Air Couriers' protest). Madison's January 22 supplement tends to support the allegation that Madison has not charged or received any fare for transportation in the Metropolitan District since August 30, 1991.

⁸ Compact, Title II, Article XI, § 6.

⁹ Order No. 3810 at 6; Unique Freight Lines Co. v. White Tiger Trans. Co., 618 F. Supp. 216 (S.D.N.Y. 1985).

Madison is a commercial carrier for hire.¹⁰ Madison refers to its current passengers as customers.¹¹ Madison charged these customers for transportation between Dulles and DC before its certificate was revoked and will do so again if its certificate is reinstated.¹² Madison's transportation of flight crews between Dulles and DC is a continuation of its previously certificated operations. This is transportation "for hire," notwithstanding the temporary absence of any charge.¹³ Under the circumstances, Madison is in violation of the Compact.

Given our holding, discovery of airline records is unnecessary and would represent an unwarranted intrusion into the files of third parties. Therefore, Air Couriers' request for oral hearing is denied.

C. Madison's Unfitness for a Certificate of Authority

Before the Commission may issue a Certificate of Authority, it must find that "the applicant is fit, willing, and able to . . . conform to the provisions of [the Compact] and conform to the rules, regulations, and requirements of the Commission" ¹⁴ "The applicant for a certificate has the burden of proving his fitness."¹⁵ The purpose of the fitness inquiry is to protect the public from those whose conduct demonstrates an unwillingness to operate in accordance with regulatory requirements.¹⁶ The inquiry is prospective, and while past violations do not necessarily preclude the grant of a certificate, they raise the inference that an applicant likely would continue to violate the law.¹⁷

In this case, where we have a record of past and present violations of the Compact and Commission regulations, we find it helpful to apply the following five-part test, developed by the ICC, to determine whether Madison is likely to commit additional infractions in the future:

¹⁰ The Commission takes official notice of the fact that Madison currently holds a Limousine Certificate from the Virginia State Corporation Commission, which is incorporated herein by reference. See Commission Regulation No. 22-05, 06, 07. We also note that Madison billed its customers \$22,303, in 1991 for transportation it claims did not require a Certificate of Authority. This underscores the "for hire" nature of its enterprise. See supra, p.2 (discussing Madison's billings).

¹¹ Reply at 2; Letter of September 12, 1991, from Madison's counsel to the Commission's Executive Director (attached to Air Couriers' protest).

¹² See Order No. 3810; Commission Regulation No. 55-02, -03.

¹³ White Tiger, 618 F. Supp. at 217.

¹⁴ Compact, Title II, Article XI, § 7(a)(i).

¹⁵ DOT, FHWA v. ICC, 733 F.2d 105, 109 (D.C. Cir. 1984).

¹⁶ Id. at 109.

¹⁷ Id. at 109.

(1) [T]he nature and extent of . . . [the carrier's] past violations, (2) the mitigating circumstances surrounding the violations, (3) whether the carrier's conduct represents a flagrant and persistent disregard of [the] Commission's rules and regulations, (4) whether it has made sincere efforts to correct its past mistakes, and (5) whether the applicant is willing and able to comport in the future with the statute and the applicable rules and regulations thereunder.¹⁸

1. Nature and Extent of Madison's Past Violations

On June 4, 1990, in a formal complaint proceeding brought by Air Couriers against Madison, we held that on or about December 12, 1989 and thereafter, Madison had willfully transported airline flight crews for hire between points in the Metropolitan District without the requisite certificate of public convenience and necessity.¹⁹ Madison was ordered to cease and desist its unauthorized operations and after 90 days certify its compliance.²⁰ Madison was permitted to continue transporting Air France crews only, under WMATC Special Authorization No. SP-132-03.²¹ That Special Authorization was converted to Certificate of Authority No. 132, on May 3, 1991.²²

On August 30, 1991, in the same formal complaint proceeding, we found that from June 1990 to May 1991 Madison continued to transport flight crews -- other than Air France crews -- for hire between points in the Metropolitan District, in knowing and willful violation of the Compact and Commission regulations.²³ The record contained evidence of nearly 1,000 trips, involving crews of four separate airlines.²⁴ In addition, we held that Madison's compliance report was knowingly misleading.²⁵ As a result, we revoked Madison's Certificate of Authority No. 132.

To this legacy, we add our finding here of Madison's ongoing violation of the Compact for transporting flight crews for hire in the Metropolitan District without a Certificate of Authority since August 30, 1991. All told, Madison has been in violation of the

¹⁸ Id. at 110.

¹⁹ Air Couriers Int'l Ground Trans. Servs. v. Madison Limo. Serv., No. FC-90-02, Order No. 3510 at 3-4 (June 4, 1990); Order No. 3810 at 1-3 & n.2; see also the complaint in Case No. FC-90-02 at 3 (incorporated here by reference).

²⁰ Order No. 3510.

²¹ Id.

²² In re Issuance of Certificate of Authority No. 132 to Madison Limo. Serv., No. MP-91-02, Order No. 3728 (May 3, 1991).

²³ Order No. 3810 at 7-8; see also Air Couriers Int'l Ground Trans. Serv. v. Madison Limo. Serv., No. FC-90-02, Order No. 3835 (Oct. 23, 1991).

²⁴ Order No. 3810 at 7.

²⁵ Id. at 7.

Compact and our regulations for the better part of two years now, for essentially the same infraction. We reaffirm our finding implicit in our revocation of Madison's certificate that these violations are serious.

2. The Absence of Mitigating Circumstances

In Order No. 3510, we expressly found a lack of any legitimate mitigating circumstances surrounding Madison's conduct through June 1990.²⁶ In Order No. 3835, we made the identical finding with regard to Madison's conduct through May 1991.²⁷ Likewise, we now find a lack of mitigating circumstances surrounding Madison's conduct since August 30, 1991.

Madison points out it has "continued to maintain the full insurance coverage required by WMATC regulations."²⁸ Maintaining the proper level of insurance is important -- so important that a Certificate of Authority is immediately invalid by operation of law without it.²⁹ We cannot, however, commend a carrier for observing some but not all of our regulations. A carrier simply may not be permitted to pick and choose which rules and regulations it will follow and which it will not. Moreover, this representation by Madison compromises its assertion that the transportation was not for-hire and was not within the Commission's jurisdiction, for -- if this were correct -- the Commission's insurance regulations would not apply.

3. Madison's Persistent and Flagrant Disregard of the Compact and the Commission's Regulations and Orders

The persistence of Madison's disregard of the Compact and the Commission's regulations and orders is summed up in nearly two years of unauthorized operations despite a cease and desist order and revocation of Madison's Certificate of Authority. When we consider Madison's failure to completely observe our tariff regulations during the short period it held a Certificate of Authority,³⁰ we are faced with two years of related nonstop violations.

The flagrancy of Madison's disregard is epitomized in its misleading compliance report. In Order No. 3510, served June 4, 1990, we specifically found Madison guilty of having transported Pan American Airlines (Pan Am) crews without authority. Madison's compliance report, filed September 20, 1990, stated that it had "discontinued serving Pan American Airlines at the Dulles International Airport" and that Madison would "consult with the

²⁶ Order No. 3510 at 6.

²⁷ Order No. 3835 at 3.

²⁸ Reply at 2.

²⁹ Compact, Title II, Article XI § 7(g).

³⁰ See Order No. 3810 at 5-6.

Transit Commission before making any new contracts"³¹ These steps were taken "to correct past mistakes and establish prospective compliance"³² This correction and compliance were illusory.

After we issued Order No. 3510, Madison continued transporting Pan Am crews for hire in the Metropolitan District throughout that June and July.³³ There was a hiatus in August and September, but Madison resumed its Pan Am operations in October, finally terminating them in November.³⁴ Madison meanwhile was transporting Lufthansa flight crews from June 1990 through May 1991, and, later, All Nippon Airways and Aeroflot crews from December 1990 through May 1991.³⁵ Needless to say, the Commission was never "consulted" on any of this. Madison has continued to carry these same flight crews between Dulles and DC since August 30, 1991, without any color of authority whatsoever. We find Madison's disregard of the Compact and our regulations to be the paradigm of flagrancy, especially in light of its September 20th certification.

4. Madison's Insincere Efforts to Correct Past Mistakes

As noted above, Madison claimed in September 1990 to have taken steps to correct its past mistakes, but those steps fell short. Madison continued to operate without authority while conveying to the Commission the misimpression of compliance. Its two-month partial effort at compliance was completely undone by its subsequent resumption of Pan Am service. Once again, Madison claims to have taken "substantial steps to ensure that it does not repeat its past mistakes,"³⁶ but, once again, it continues to transport passengers for hire between points in the Metropolitan District without authority.

Madison says it has hired a full-time operations officer so that its president can devote more time to compliance matters, and Madison apparently has hired counsel to act as its "Compliance Office."³⁷ So far, these steps have had no meaningful effect. We cannot characterize Madison's current free-ride policy as a sincere attempt at compliance with the Compact and our regulations. We already explained to Madison when we revoked its certificate that its operations do not escape our jurisdiction just because its passengers occasionally ride free.³⁸

³¹ Letter of September 18, 1990, from Madison's president to the Commission's Executive Director (filed in Case No. FC-90-02 and incorporated herein by reference).

³² Id.

³³ Order No. 3810 at 5.

³⁴ Id. at 5.

³⁵ Id. at 5.

³⁶ See Madison's application, Exhibit X.

³⁷ See id.

³⁸ Order No. 3810 at 6.

5. Madison's Unwillingness and Inability to Comport with the Compact and the Commission's Regulations

The fifth factor in the ICC's test "subsumes the ultimate conclusion -- the likelihood of [Madison's] future compliance with the law."³⁹ "[It] is a catch-all that allows the Commission to consider evidence bearing directly on [Madison's] willingness to reform that may not fall within the first four criteria."⁴⁰ We see nothing in the pleadings concerning Madison's compliance fitness that we have not already considered under the first four criteria. Accordingly, we find Madison unfit as to regulatory compliance and deny its application on this ground, with leave to reapply in ninety days.

D. Assessment of Civil Forfeiture

The Compact, Title II, Article XIII, § 6(f) provides that a person who knowingly and willfully violates a provision of the Compact shall be subject to a civil forfeiture of not more than \$1,000 for the first violation and not more than \$5,000 for any subsequent violation and that each day of the violation constitutes a separate violation.

In this case, we have evidence of 122 separate violations. Madison admits transporting Lufthansa flight crews between Dulles and DC continuously from September 1, 1991, through December 31, 1991.⁴¹ As held above, this transportation was "for hire" in violation of the Compact, Title II, Article XI, § 6. We find that these violations were knowing and willful.

Madison knew on those 122 occasions that it did not possess a Certificate of Authority. Madison also knew that it needed a Certificate of Authority to transport passengers for hire in the Metropolitan District. Madison further knew that its transportation of airline crews in the Metropolitan District constituted transportation "for hire" -- even when these customers did not pay.⁴²

The term "willfully," as it is used here, does not mean with evil purpose or criminal intent. It means "purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the [Compact] or is plainly indifferent to its requirements."⁴³ This certainly describes Madison. Its failure to obtain a Certificate of Authority before continuing to transport airline crews in the Metropolitan District "unquestionably discloses disregard of the [Compact] and indifference to its requirements."⁴⁴

³⁹ DOT, FHWA v. ICC, 733 F.2d at 112.

⁴⁰ Id. at 113.

⁴¹ See supra, p. 2 (discussing Madison's invoices to Lufthansa).

⁴² Order No. 3810 at 6.

⁴³ United States v. Illinois Cent. R.R., 303 U.S. 239, 243, 58 S.Ct. 533, 535 (1938).

⁴⁴ 58 S.Ct. at 535.

The civil forfeiture provision of the Compact serves two functions: deterrence and restitution. So far, the Commission has been unsuccessful in deterring Madison's unauthorized operations, despite issuing a cease and desist order in June 1990 and revoking Madison's Certificate of Authority in August 1991. We are running out of administrative options, and a civil forfeiture assessment is warranted under the circumstances. On the other hand, Madison appears not to have received any revenue from its operations in the Metropolitan District since August 30, 1991. Therefore, the Commission assesses a civil forfeiture of \$500 per violation, for a total assessment of \$61,000, and suspends all but \$4,000, in the absence of any evidence of unjust enrichment.

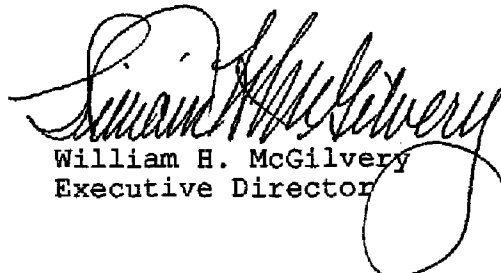
II. CONCLUSION

In the future, we would view Madison's complete and immediate cessation of unauthorized operations and prompt payment of civil forfeiture as sincere efforts to correct past errors. As the record stands now, however, we cannot grant this application.

THEREFORE, IT IS ORDERED:

1. That the timely protest of Air Couriers International Ground Transportation Services, Inc., trading as Passenger Express, is hereby accepted for filing and serves to make it a party to this proceeding.
2. That the request for oral hearing of Air Couriers International Ground Transportation Services, Inc., trading as Passenger Express, is hereby denied.
3. That the application of Madison Limousine Service, Inc., for a Certificate of Authority is hereby denied for lack of regulatory compliance fitness.
4. That Madison Limousine Service, Inc., is hereby granted leave to reapply for a Certificate of Authority after ninety days from the date of this order.
5. That Madison Limousine Service, Inc., is hereby directed to pay to the Commission, within thirty (30) days, by money order, certified check or cashier's check, the sum of four thousand dollars (\$4,000).
6. That Madison Limousine Service, Inc., is hereby directed to immediately cease and desist from transporting passengers for hire between points in the Metropolitan District.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS DAVENPORT, SCHIFTER, AND SHANNON:


William H. McGilver
Executive Director